





## **MASTER SERVICES AGREEMENT FOR PROFESSIONAL SERVICES**

THIS AGREEMENT, made and entered into as of the 19th day of January, 2012, by and between CDM Smith Inc. whose address is 800 Brickell Avenue Suite 500, Miami, Florida 33131 (hereafter "CONSULTANT or ENGINEER) and Monroe County, a political subdivision of the State of Florida, represented by its Board of County Commissioners whose address is 1100 Simonton Street, Key West, Florida, 33040 (hereinafter called "COUNTY"), collectively referred to herein as "Parties", provides as follows:

ENGINEER's Services will be performed pursuant to individual Task Orders issued by OWNER and agreed to by ENGINEER. Such Task Orders will contain the specific scope of work ("Services"), the time schedule, charges and payment conditions, and additional terms and conditions that are applicable to such Task Orders. An example Task Order is attached hereto.

Execution of a Task Order by ENGINEER and COUNTY constitutes COUNTY's written authorization to ENGINEER to proceed with the Services described in the Task Order. This Agreement will become effective on the date first above written.

The terms and conditions of this Agreement shall apply to each Task Order, except to the extent expressly modified. When a Task Order is to modify a provision of this Agreement, the Article of this Agreement to be modified shall be specifically referenced in the Task Order and the modification shall be precisely described.

### **ARTICLE 1 – SCOPE OF SERVICES**

- 1.1 ENGINEER will perform for COUNTY services as described in individual Task Orders (hereinafter referred to as "Services") in accordance with the requirements outlined in this Agreement.

### **ARTICLE 2 – TIMES FOR RENDERING SERVICES**

- 2.1 The initial term of this Agreement shall be three years commencing January 19, 2012 and terminating January 18, 2015, subject to the conditions specified in Article 5.3 of this Agreement. The COUNTY, at its discretion, shall have the option to renew this Agreement for two (2) additional one (1) year terms.
- 2.2 The specific time period for the performance of ENGINEER's Services will be set forth in individual Task Orders.
- 2.3 If the specific periods of time for rendering services or specific dates by which services are to be completed for any individual Task Order are changed through no fault of ENGINEER, the rates and amounts of compensation provided for herein shall be subject to equitable adjustment.

### **ARTICLE 3 – OWNER’S RESPONSIBILITIES**

COUNTY shall do the following in a timely manner so as not to delay the services of ENGINEER and shall bear all costs incident thereto:

- 3.1 Pay the ENGINEER in accordance with the terms of this Agreement.
- 3.2 Provide all criteria and full information as to COUNTY’s requirement for a Task Order and designate in writing a person to act as COUNTY’s representative with respect to the services to be performed or furnished by ENGINEER under this Agreement. Such person will have complete authority to transmit instructions, receive information, interpret, and define COUNTY’s policies and decisions with respect to ENGINEER’s services for the project.
- 3.3 Provide all criteria and full information as to COUNTY’s requirements for the project described in each Task Order, including, as applicable to the Services, design objectives and constraints, space, capacity and performance requirements, flexibility and expandability, and furnish copies of all design and construction standards which ~~OWNER~~ COUNTY will require to be included in the Drawings and Specifications.
- 3.4 Furnish to ENGINEER all existing studies, reports and other available data and services of others pertinent to the Task Order, obtain or authorize ENGINEER to obtain or provide additional reports and data as required, and furnish to ENGINEER services of others required for the performance of ENGINEER’s services for a Task Order, and ENGINEER shall be entitled to use and rely upon all such information and services provided by COUNTY or others in performing ENGINEER’s services under a Task Order.
- 3.5 Assist ENGINEER by placing at ENGINEER’s disposal all available information pertinent to the project described in each Task Order including previous reports and, as applicable to the Services, any other data relative to design or construction of the project.
- 3.6 Provide access to and make all provisions for ENGINEER to enter upon County property as required for ENGINEER to perform services under a Task Order and inform and assist ENGINEER in obtaining access to private property and property owned by other government entities as required.
- 3.7 Examine all studies, reports, sketches, Drawings, Specifications, proposals and other documents presented by ENGINEER, obtain advice of an attorney, insurance counselor and other consultants as OWNER deems appropriate for such examination and render in writing decisions pertaining thereto within a reasonable time so as not to delay the services of ENGINEER.
- 3.8 Assist ENGINEER in obtaining approvals and permits from all governmental authorities having jurisdiction over the Task Order and such approvals and consents from others as may be necessary for completion of the Task Order.

- 3.9 Give prompt written notice to ENGINEER whenever COUNTY observes or otherwise becomes aware of any development that affects the scope or time of performance or furnishing of ENGINEER's Services or any defect or conformance in ENGINEER's Services or in the work of any Contractor.
- 3.10 COUNTY agrees to assume responsibility for personal and property damages due to ENGINEER's interference with subterranean structures such as pipes, tanks and utility lines that are not correctly shown on the documents and information provided to ENGINEER.

#### **ARTICLE 4 – PAYMENTS TO ENGINEER FOR SERVICES**

##### **4.1 Methods of Payment for Services of ENGINEER.**

- 4.1.1 COUNTY shall pay ENGINEER for Services performed or furnished under this Agreement or as described in each Task Order. The amount of any excise, VAT, or gross receipts tax that may be imposed shall be added to the compensation shown in each Task Order.
- 4.1.2 The CONSULTANT shall submit to the COUNTY an invoice with supporting documentation acceptable to the Clerk on a schedule as set forth in the contract. Acceptability to the Clerk is based on generally accepted accounting principles and such laws, rules and regulations as may govern the Clerk's disbursement of funds.
- 4.1.3 If COUNTY fails to make any payment due ENGINEER in accordance with the Florida Prompt Payment Act F.S. chapter 255, the amounts due ENGINEER will be increased at the rate of 1.0% per month (or the maximum rate of interest permitted by law, if less) and, in addition, ENGINEER may, after giving seven days' written notice to COUNTY, suspend services under this Agreement until ENGINEER has been paid in full all amounts due for services, expenses and charges. Payments will be credited first to interest and then to principal. In the event of a disputed or contested billing, only that portion so contested may be withheld from payment, and the undisputed portion will be paid.

COUNTY agrees to pay ENGINEER all costs of collection including but not limited to reasonable attorneys' fees, collection fees and court costs incurred by ENGINEER to collect properly due payments.

#### **ARTICLE 5 – GENERAL CONDITIONS**

##### **5.1 Standard of Care**

The standard of care for all professional engineering and related services performed or furnished by ENGINEER under this Agreement will be the care and skill ordinarily used by members of ENGINEER's profession practicing under similar conditions at the same time and in the same locality.

## 5.2 Opinions of Probable Construction Cost

ENGINEER's opinions of probable Construction Cost, as applicable to the Services provided for herein are to be made on the basis of ENGINEER's experience and qualifications and represent ENGINEER's best judgment as an experienced and qualified professional engineer generally familiar with the construction industry. However, since ENGINEER has no control over the cost of labor, materials, equipment, or services furnished by others, or over the Contractor's methods of determining prices, or over competitive bidding or market conditions, ENGINEER cannot and does not guarantee that proposals, bids, or actual Construction Cost will not vary from opinions of probable Construction Cost prepared by ENGINEER. If OWNER wishes greater assurance as to probable Construction Cost, OWNER shall employ an independent cost estimator.

## 5.3 Termination

The obligation to provide further services under this Agreement may be terminated by either party upon thirty days' written notice in the event of substantial failure by the other party to perform in accordance with the terms thereof through no fault of the terminating party. In the event of any termination, ENGINEER will be paid for all services rendered and reimbursable expenses incurred to the date of termination and, in addition, all reimbursable expenses directly attributable to termination.

## 5.4 Use of Documents

5.4.1 All Documents are instruments of service in respect to this Project, and ENGINEER shall retain an ownership and property interest therein (including the copyright and the right of reuse at the discretion of the ENGINEER) whether or not the Project is completed.

5.4.2 COUNTY may rely upon that data or information set forth on paper (also known as hard copies) that the COUNTY receives from the ENGINEER by mail, hand delivery, or facsimile, are the items that the ENGINEER intended to send. Files in electronic media format of text, data, graphics, or other types that are furnished by the ENGINEER to the COUNTY are furnished only for convenience, not reliance by the COUNTY. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk. In all cases, the original hard copy of the documents takes precedence over the electronic files.

5.4.3 Because data stored in electronic media format can deteriorate or be modified inadvertently or otherwise without authorization of the data's creator, the COUNTY receiving electronic files agrees that it will perform acceptance tests or procedures within 60 days, after which the COUNTY shall be deemed to have accepted the data thus transferred. Any transmittal errors detected within the 60-day acceptance period will be corrected by the ENGINEER.

5.4.4. When transferring documents in electronic media format, the ENGINEER makes no representations as to long-term compatibility, usability, or readability of such

documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by the ENGINEER.

5.4.5 COUNTY may make and retain copies of documents for information and reference in connection with use on the Project by COUNTY. ENGINEER grants COUNTY a license to use the Documents on the Project, extensions of the Project, and other projects of COUNTY, subject to the following limitations: (1) COUNTY acknowledges that such Documents are not intended or represented to be suitable for use on the Project unless completed by ENGINEER, or for use or reuse by COUNTY or others on extensions of the Project or on any other project without written verification or adaptation by ENGINEER; (2) any such use or reuse, or any modification of the Documents, without written verification, completion, or adaptation by ENGINEER, as appropriate for the specific purpose intended, will be at COUNTY's sole risk and without liability or legal exposure to ENGINEER or to ENGINEER's Consultants; (3) COUNTY shall, to the limits set forth in Florida Statute 768.28, indemnify and hold harmless ENGINEER and ENGINEER's Consultants from all claims, damages, losses, and expenses, including attorneys' fees, arising out of or resulting from any use, reuse, or modification without written verification, completion, or adaptation by ENGINEER; (4) such limited license to COUNTY shall not create any rights in third parties.

5.4.6. If ENGINEER at COUNTY's request verifies or adapts the Documents for extensions of the Project or for any other project, then COUNTY shall compensate ENGINEER at rates or in an amount to be agreed upon by OWNER and ENGINEER.

#### 5.5 Controlling Law

This Agreement shall be governed by and construed in accordance with the laws of the State of Florida applicable to contracts made and to be performed entirely in the State. In the event that any cause of action or administrative proceeding is instituted for the enforcement or interpretation of this Agreement, the County and CONSULTANT agree that venue will lie in the appropriate court or before the appropriate administrative body in Monroe County, Florida.

#### 5.6 Mutual Waiver of Consequential Damages

Notwithstanding any other provision of this Agreement to the contrary, neither party including their officers, agents, servants and employees shall be liable to the other for lost profits or any special, indirect, incidental, or consequential damages in any way arising out of this Agreement however caused under a claim of any type or nature based on any theory of liability (including, but not limited to: contract, tort, or warranty) even if the possibility of such damages has been communicated.

#### 5.7 Limitation of Liability

In no event shall ENGINEER's total liability to COUNTY and/or any of the COUNTY's officers, employees, agents, contractors or subcontractors for any and all injuries, claims, losses, expenses or damages whatsoever arising out of or in any way related to this

agreement from cause or causes, including, but not limited to, ENGINEER's wrongful act, omission, negligence, errors, strict liability, breach of contract, breach of warranty, express or implied, exceed the total amount of fee paid to ENGINEER under this agreement or \$500,000, whichever is greater.

## 5.8 Successors and Assigns

5.8.1. COUNTY and ENGINEER each is hereby bound and the partners, successors, executors, administrators and legal representatives of COUNTY and ENGINEER (and to the extent permitted by paragraph 5.8.2 the assigns of COUNTY and ENGINEER) are hereby bound to the other party to this Agreement and to the partners, successors, executors, administrators and legal representatives (and said assigns) of such other party, in respect of all covenants, agreements and obligations of this Agreement.

5.8.2. Neither COUNTY nor ENGINEER may assign, sublet or transfer any rights under or interest (including, but without limitation, moneys that may become due or moneys that are due) in this Agreement without the written consent of the other, except to the extent that any assignment, subletting or transfer is mandated by law or the effect of this limitation may be restricted by law. Unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under this Agreement.

5.8.3. Unless expressly provided otherwise in this Agreement:

5.8.3.1. Nothing in this Agreement shall be construed to create, impose or give rise to any duty owed by ENGINEER to any Contractor, Subcontractor, Supplier, other person or entity, or to any surety for or employee of any of them, or give any rights in or benefits under this Agreement to anyone other than COUNTY and ENGINEER.

5.8.3.2. All duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of ~~OWNER~~ COUNTY and ENGINEER and not for the benefit of any other party.

## 5.9 Notices

Any notice required or permitted under this agreement shall be in writing and hand delivered or mailed, postage prepaid, to the other party by certified mail, returned receipt requested, or by a nationally recognized overnight courier service to the following:

FOR COUNTY

County Administrator  
1100 Simonton Street  
Key West, FL 33040

and County Attorney  
PO Box 1026  
Key West, Fl. 33041-1026

FOR CONSULTANT:  
Ignacio L. Lizama, P.E.  
Associate  
CDM Smith Inc.  
800 Brickell Avenue, Suite 500  
Miami, FL 33131

All notices shall be effective upon the date of receipt.

5.10 Severability

Any provision or part of the Agreement held to be void or unenforceable under any law or regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon OWNER and ENGINEER, who agree that the Agreement shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

5.11 Changed Conditions

If concealed or unknown conditions that affect the performance of the Services are encountered, which conditions are not ordinarily found to exist or which differ materially from those generally recognized as inherent in the Services of the character provided for under this Agreement or which could not have reasonably been anticipated, notice by the observing party shall be given promptly to the other party and, if possible, before conditions are disturbed. Upon claim by the ENGINEER, the payment and schedule shall be equitably adjusted for such concealed or unknown condition by change order or amendment to reflect additions that result from such concealed, changed, or unknown conditions.

5.12 Environmental Site Conditions

5.12.1 COUNTY has disclosed to ENGINEER in writing the existence of all known and suspected Asbestos, PCBs, Petroleum, Hazardous Waste, Radioactive Material, hazardous substances, and other Constituents of Concern, as defined in Article 6, located at or near the Site, including type, quantity, and location.

5.12.2 COUNTY represents to ENGINEER that to the best of its knowledge no Constituents of Concern, other than those disclosed in writing to ENGINEER, exist at the Site.

5.12.3 If ENGINEER encounters an undisclosed Constituent of Concern, then ENGINEER shall notify (1) COUNTY and (2) appropriate governmental officials if ENGINEER reasonably concludes that doing so is required by applicable Laws or Regulations.

5.12.4 It is acknowledged by both parties that ENGINEER's scope of services does not include any services related to Constituents of Concern. If ENGINEER or any other

party encounters an undisclosed Constituent of Concern, or if investigative or remedial action, or other professional services, are necessary with respect to disclosed or undisclosed Constituents of Concern, then ENGINEER may, at its option and without liability for consequential or any other damages, suspend performance of services on the portion of the Project affected thereby until COUNTY: (1) retains appropriate specialist consultant(s) or contractor(s) to identify and, as appropriate, abate, remediate, or remove the Constituents of Concern, and (2) warrants that the Site is in full compliance with applicable Laws and Regulations.

5.12.5 If the presence at the Site of undisclosed Constituents of Concern adversely affects the performance of ENGINEER's services under this Agreement, then the ENGINEER shall have the option of (1) accepting an equitable adjustment in its compensation or in the time of completion, or both; or (2) terminating this Agreement for cause on 30 days' notice.

### 5.13 Insurance

As a pre-requisite of the work governed, or the goods supplied under this Agreement (including the pre-staging of personnel and material), the CONSULTANT shall obtain, at his own expense, insurance as specified in any attached schedules, which are made part of this Agreement. The CONSULTANT will ensure that the insurance obtained will extend protection to all Contractors and subcontractors engaged by the CONSULTANT. As an alternative, the ENGINEER may require all Contractors and Subcontractors to obtain insurance consistent with the attached schedules.

The CONSULTANT will not be permitted to commence work governed by this Agreement (including pre-staging of personnel and material) until satisfactory evidence of the required insurance has been furnished to the COUNTY as specified below. Delays in the commencement of work, resulting from the failure of the CONSULTANT to provide satisfactory evidence of the required insurance, shall not extend any specified deadlines and any penalties and failure to perform assessments shall be imposed as if the work commenced on the specified date and time, except for the CONSULTANT's failure to provide satisfactory evidence.

The CONSULTANT shall maintain the required insurance throughout the entire term of this contract and any extensions specified in the attached schedules. Failure to comply with this provision may result in the immediate suspension of all work until the required insurance has been reinstated or replaced. Delays in the completion of work resulting from the failure of the CONSULTANT to maintain the required insurance shall not extend any specified deadlines and any penalties and failure to perform assessments shall be imposed as if the work had not been suspended, except for the CONSULTANT's failure to maintain the required insurance.

The CONSULTANT shall provide, to the COUNTY, as satisfactory evidence of the required insurance, a Certificate of Insurance.

The acceptance and/or approval of the CONSULTANT's insurance shall not be construed as relieving the CONSULTANT from any liability or obligation assumed under this Agreement or imposed by law.

The Monroe County Board of County Commissioners, its employees and officials will be included as Additional Insured on all policies, except for Workers' Compensation and Professional Liability.

Any deviations from these General Insurance Requirements must be requested in writing on the County-prepared form entitled, "**Request for Waiver of Insurance Requirements**" and approved by Monroe County Risk Management.

Prior to execution of this agreement, the CONSULTANT shall furnish the COUNTY Certificates of Insurance indicating the minimum coverage limitations as indicated by the attached forms identified as exhibit's 1 through 4, each attached hereto and incorporated as part of this contract document, and all other requirements found to be in the best interest of Monroe County as may be imposed by the Monroe County Risk Management Department.

#### 5.14 Discovery

ENGINEER shall be entitled to compensation on a time and materials basis when responding to all requests for discovery relating to this Project and to extent that ENGINEER is not a party to the lawsuit.

#### 5.15 Nondiscrimination and Affirmative Action

CONSULTANT agrees that there will be no discrimination against any person and it is expressly understood that upon a determination by a court of competent jurisdiction that discrimination has occurred, this Agreement automatically terminates without any further action on the part of any party, effective the date of the court order. However, in the event of such termination, CONSULTANT shall be paid for all services rendered and reimbursable expenses incurred to the date of termination. CONSULTANT agrees to comply with all Federal and Florida statutes, and all local ordinances, as applicable, relating to nondiscrimination. These include but are not limited to: 1) Title VI of the Civil Rights Act of 1964 (PL 88-352) which prohibits discrimination on the basis of race, color or national origin; 2) Title IX of the Education Amendment of 1972, as amended (20 USC ss. 1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; 3) Section 504 of the Rehabilitation Act of 1973, as amended (20 USC s. 794), which prohibits discrimination on the basis of handicaps; 4) The Age Discrimination Act of 1975, as amended (42 USC ss. 6101- 6107) which prohibits discrimination on the basis of age; 5) The Drug Abuse Office and Treatment Act of 1972 (PL 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; 6) The Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (PL 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; 7) The Public Health Service Act of 1912, ss. 523 and 527 (42 USC ss. 690dd-3 and 290ee-3), as amended, relating to confidentiality of alcohol and drug abuse patient records; 8) Title VIII of the Civil Rights Act of 1968 (42 USC s. et seq.), as amended, relating to

nondiscrimination in the sale, rental or financing of housing; 9) The Americans with Disabilities Act of 1990 (42 USC s. 1201 Note), as maybe amended from time to time, relating to nondiscrimination on the basis of disability; 10) Any other nondiscrimination provisions in any Federal or state statutes which may apply to the parties to, or the subject matter of, this Agreement.

#### 5.16 Force Majeure

Any delays in or failure of performance by ENGINEER shall not constitute a default under this Agreement if such delays or failures of performance are caused by occurrences beyond the reasonable control of ENGINEER including but not limited to: acts of God or the public enemy; expropriation or confiscation; compliance with any order of any governmental authority; changes in law; act of war, rebellion, terrorism or sabotage or damage resulting there from; fires, floods, explosions, accidents, riots; strikes or other concerted acts of workmen, whether direct or indirect; delays in permitting not reasonably under the CONSULTANT'S control; COUNTY's failure to provide data in COUNTY's possession or provide necessary comments in connection with any required reports prepared by ENGINEER, or any other causes which are beyond the reasonable control of ENGINEER. ENGINEER's scheduled completion date shall be adjusted to account for any force majeure delay and ENGINEER shall be reimbursed by COUNTY for all costs incurred in connection with or arising from a force majeure event, including but not limited to those costs incurred in the exercise of reasonable diligence to avoid or mitigate a force majeure event.

#### 5.17 Waiver

Waiver by either party of any breach or failure to enforce any of the terms and conditions of this Agreement at any time shall not in any way effect, limit, or waive such party's rights thereafter to enforce and compel strict compliance with all the terms and conditions of this Agreement.

#### 5.18 Section Headings

Section headings have been inserted in this Agreement as a matter of convenience of reference only, and it is agreed that such section headings are not a part of this Agreement and will not be used in the interpretation of any provision of this Agreement.

#### 5.19 Subcontractors

ENGINEER may utilize such ENGINEER's Subcontractors as ENGINEER deems necessary to assist in the performance of its Services.

#### 5.20 Coordination with Other Documents

It is the intention of the parties that if the ENGINEER's Services include design services, then the Standard General Conditions will be used as the General Conditions for the Project and that all amendments thereof and supplements thereto will be generally consistent therewith. Except as otherwise defined herein, the terms which have an initial capital letter in this Agreement and are defined in the Standard General Conditions will be used in this Agreement as defined in the Standard General Conditions. The term "*defective*" will be used in this Agreement as defined in the Standard General Conditions.

#### 5.21 Purchase Order

Notwithstanding anything to the contrary contained in any purchase order or in this Agreement, any purchase order issued by COUNTY to ENGINEER shall be only for accounting purposes for COUNTY and the pre-printed terms and conditions contained on any such purchase order are not incorporated herein, shall not apply to this Agreement, and shall be void for the purposes of the Services performed by ENGINEER under this Agreement.

#### 5.22 Change Orders

5.22.1 Any work not contained in a Task Order shall be a change, and shall be performed by ENGINEER only pursuant to a written Change Order to this Agreement signed by COUNTY and ENGINEER. Such a Change Order may increase or decrease the Work within the general scope of this Agreement. If this Change Order causes an increase in the cost of the Work, or of the time required for the performance of the Work, ENGINEER shall be paid additional compensation acceptable to both parties in accordance with Exhibit A or granted an extension of the schedule, or both.

5.22.2 In the event COUNTY requests ENGINEER to develop information necessary for the consideration of a change in the project, and such a change is not adopted, COUNTY shall reimburse ENGINEER for the costs which it incurs in connection with such efforts.

#### 5.23 Construction Contractor's Means and Methods

ENGINEER shall have no authority over or responsibility for the means, methods, techniques, sequences, or procedures selected by the construction contractor or for safety precautions and programs incident to the work of the construction contractor.

#### 5.24 Reporting Regulated Conditions

To the extent required by law, COUNTY shall promptly report regulated conditions, including, without limitation, the discovery of releases of hazardous substances at the site to the appropriate public authorities in accordance with applicable law.

#### 5.25 Indemnification

The ENGINEER shall indemnify and hold harmless the OWNER and its officers and employees from liabilities, damages, losses, and costs, including, but not limited to, reasonable attorney's fees, to the extent caused by the negligence, recklessness, or intentional wrongful conduct of the ENGINEER and other persons employed or utilized by the consultant in the performance of this Agreement, in accordance with Section 725.08 of the Florida Statutes.

#### 5.26 Status of ENGINEER

Nothing contained in this Agreement shall be construed or interpreted as requiring ENGINEER, its officers, agents, servants, or employees to assume the status of a generator, storer, treater, transporter or disposal facility as those terms appear within the Resource

Conservation Recovery Act, 42USCA, Section 6901, et seq. (RCRA), or within any state statute of similar effect governing the treatment, storage, transportation or disposal of waste.

#### 5.27 Dispute Resolution

In the event of any dispute between the parties arising out of or in connection with the contract or the services or work contemplated herein; the parties agree to first make a good faith effort to resolve the dispute informally. Negotiations shall take place between the designated principals of each party. If the parties are unable to resolve the dispute through negotiation within 45 days, then either party may give written notice within 10 days thereafter that it elects to proceed with non-binding mediation pursuant to the commercial mediation rules of the American Arbitration Association. In the event that mediation is not invoked by the parties or that the mediation is unsuccessful in resolving the dispute, then either party may submit the controversy to a court of competent jurisdiction. The foregoing is a condition precedent to the filing of any action other than an action for injunctive relief or if a Statute of Limitations may expire.

Each party shall be responsible for its own costs and expenses including attorneys' fees and court costs incurred in the course of any dispute, mediation, or legal proceeding. The fees of the mediator and any filing fees shall be shared equally by the parties.

### **ARTICLE 6 – DEFINITIONS**

- Whenever used in this Agreement the following terms have the meanings indicated which are applicable to both the singular and the plural.

#### 6.1.1 Services

The services to be performed for or furnished to COUNTY by ENGINEER described in this Agreement.

#### 6.1.2 Agreement

This Agreement between COUNTY and ENGINEER for Professional Services including those exhibits listed in Article 6.

#### 6.1.3 Constituent of Concern

Any substance, product, waste, or other material of any nature whatsoever (including, but not limited to, Asbestos, Petroleum, Radioactive Material, and PCBs) which is or becomes listed, regulated, or addressed pursuant to [a] the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601 et seq, (“CERCLA”); [b] the Hazardous Materials Transportation Act, 49 U.S.C. §§1801 et seq.; [c] the Resource Conservation and Recovery Act, 42 U.S.C. §§6901 et seq. (“RCRA”); [d] the Toxic Substances Control Act, 15 U.S.C. §§2601 et seq.; [e] the Clean Water Act, 33 U.S.C. §1251 et seq.; [f] the Clean Air Act, 42 U.S.C. §§7401 et seq.; and [g] any other federal, state, or local statute, law, rule, regulation, ordinance, resolution, code, order, or decree regulating, relating to,

or imposing liability or standards of conduct concerning, any hazardous, toxic, or dangerous waste, substance, or material.

**6.1.4 Construction Cost**

The total cost to COUNTY of those portions of the entire Project designed or specified by ENGINEER. Construction Cost does not include ENGINEER's compensation and expenses, the cost of land, rights-of-way, or compensation for or damages to properties, or COUNTY's legal, accounting, insurance counseling or auditing services, or interest and financing charges incurred in connection with the Project or the cost of other services to be provided by others to COUNTY pursuant to Article 3. Construction Cost is one of the items comprising Total Project Costs.

**6.1.5 Documents**

As applicable to the Services, the data, reports, drawings, specifications, record drawings and other deliverables, whether in printed or electronic media format, provided or furnished by ENGINEER to COUNTY pursuant to the terms of this Agreement.

**6.1.6 Contractor**

The person or entity with whom COUNTY enters into a written agreement covering construction work to be performed or furnished with respect to the Project.

**6.1.7 ENGINEER's Subcontractor**

A person or entity having a contract with ENGINEER to perform or furnish Services as ENGINEER's independent professional subcontractor engaged directly on the Project.

**6.1.8 Project**

The total undertaking as described in each Task Order.

**6.1.9 Reimbursable Expenses**

The expenses incurred directly in connection with the performance or furnishing of Services for the Project for which OWNER shall pay ENGINEER as agreed in Exhibit in each ENGINEER's Task Authorization.

**6.1.10 Resident Project Representative**

The authorized representative of ENGINEER who will be assigned to assist ENGINEER at the site during the Construction Phase. The Resident Project Representative will be ENGINEER's agent or employee and under ENGINEER's supervision. As used herein, the term Resident Project Representative includes any assistants of Resident Project Representative agreed to by COUNTY. The duties and responsibilities of the Resident Project Representative are set forth in Exhibit B, "Duties, Responsibilities and Limitations of Authority of Resident Project Representative" ("Exhibit B").

6.1.11 Standard General Conditions -

The Standard General Conditions of the Construction Contract (No.) of the Engineers Joint Contract Documents Committee.

6.1.12 Total Project Costs -

The sum of the Construction Cost, allowances for contingencies, the total costs of design professional and related services provided by ENGINEER and (on the basis of information furnished by COUNTY) allowances for such other items as charges of all other professionals and consultants, for the cost of land and rights-of-way, for compensation for or damages to properties, for interest and financing charges and for other services to be provided by others to COUNTY under Article 3.

## **ARTICLE 7 – EXHIBITS AND SPECIAL PROVISIONS**

- 7.1 This Agreement is subject to the provisions of the following Exhibits which are attached to and made a part of the Agreement;  
Exhibits 1 through 5 inclusive,  
This Agreement (consisting of Pages 1 to inclusive), and the Exhibits identified above constitute the entire agreement between OWNER and ENGINEER and supersede all prior written or oral understandings. This Agreement may only be amended, supplemented, modified, or canceled by a duly executed written instrument.

## **ARTICLE 8 -MISCELLANEOUS**

- 8.1 Authority. Each party represents and warrants to the other that the execution, delivery and performance of this Agreement have been duly authorized by all necessary County and corporate action, as required by law.
- 8.2 Claims for Federal or State Aid. CONSULTANT and COUNTY agree that each shall be, and is, empowered to apply for, seek, and obtain federal and state funds to further the purpose of this Agreement; provided that all applications, requests, grant proposals, and funding solicitations submitted by the CONSULTANT shall be approved by the COUNTY prior to submission.
- 8.3 Privileges and Immunities. All of the privileges and immunities from liability, exemptions from laws, ordinances, and rules and pensions and relief, disability, workers' compensation, and other benefits which apply to the activity of officers, agents, or employees of any public agents or employees of the COUNTY, when performing their respective functions under this Agreement within the territorial limits of the County shall apply to the same degree and extent to the performance of such functions and duties of such officers, agents, volunteers, or employees outside the territorial limits of the County.
- 8.4 Legal Obligations and Responsibilities. Non-Delegation of Constitutional or Statutory Duties. This Agreement is not intended to, nor shall it be construed as, relieving any participating entity from any obligation or responsibility imposed upon the entity by law

except to the extent of actual and timely performance thereof by any participating entity, in which case the performance may be offered in satisfaction of the obligation or responsibility. Further, this Agreement is not intended to, nor shall it be construed as, authorizing the delegation of the constitutional or statutory duties of the County, except to the extent permitted by the Florida constitution, state statute, and case law.

- 8.5 **Non-Reliance by Non-Parties.** No person or entity shall be entitled to rely upon the terms, or any of them, of this Agreement to enforce or attempt to enforce any third-party claim or entitlement to or benefit of any service or program contemplated hereunder, and the COUNTY and the CONSULTANT agree that neither the COUNTY nor the CONSULTANT or any agent, officer, or employee of either shall have the authority to inform, counsel, or otherwise indicate that any particular individual or group of individuals, entity or entities, have entitlements or benefits under this Agreement separate and apart, inferior to, or superior to the community in general or for the purposes contemplated in this Agreement.
- 8.6 **Attestations.** Consultant agrees to execute such documents as the COUNTY may reasonably require, including a Public Entity Crime Statement, an Ethics Statement, and a Drug-Free Workplace Statement.
- 8.7 **No Personal Liability.** No covenant or agreement contained herein shall be deemed to be a covenant or agreement of any member, officer, agent or employee of the COUNTY or CONSULTANT in their individual capacities, and no member, officer, agent or employee of the COUNTY or CONSULTANT shall be liable personally on this Agreement or be subject to any personal liability or accountability by reason of the execution of this Agreement.
- 8.8 **Execution In Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be regarded as an original, all of which taken together shall constitute one and the same instrument and any of the parties hereto may execute this Agreement by signing any such counterpart.
- 8.9 **Covenant of No Interest.** COUNTY and CONSULTANT covenant that neither presently has any interest, and shall not acquire any interest, which would conflict in any manner or degree with its performance under this Agreement, and that only interest of each is to perform and receive benefits as recited in this Agreement.
- 8.10 **Code of Ethics.** COUNTY agrees that officers and employees of the COUNTY recognize and will be required to comply with the standards of conduct for public officers and employees as delineated in Section 112.313, Florida Statutes, regarding, but not limited to, solicitation or acceptance of gifts; doing business with one's agency; unauthorized compensation; misuse of public position, conflicting employment or contractual relationship; and disclosure or use of certain information.
- 8.11 **No Solicitation/Payment.** The COUNTY and CONSULTANT warrant that, in respect to itself, it has neither employed nor retained any company or person, other than a bona fide

employee working solely for it, to solicit or secure this Agreement and that it has not paid or agreed to pay any person, company, corporation, individual, or firm, other than a bona fide employee working solely for it, any fee, commission, percentage, gift, or other consideration contingent upon or resulting from the award or making of this Agreement. For the breach or violation of the provision, the CONSULTANT agrees that the COUNTY shall have the right to terminate this Agreement without liability and, at its discretion, to offset from monies owed, or otherwise recover, the full amount of such fee, commission, percentage, gift, or consideration.

- 8.12 **Non-Waiver of Immunity.** Notwithstanding the provisions of Sec. 768.28, Florida Statutes, the participation of the COUNTY and the CONSULTANT in this Agreement and the acquisition of any commercial liability insurance coverage, self-insurance coverage, or local government liability insurance pool coverage shall not be deemed a waiver of immunity to the extent of liability coverage, nor shall any contract entered into by the County be required to contain any provision for waiver.
- 8.13 **Rights and Remedies.** The specific remedies set forth in this Agreement, including but not limited to those remedies with respect to the quality of the Services performed by CONSULTANT hereunder, are the exclusive remedies of the Parties.
- 8.14 **Time of Accrual.** For services performed by CONSULTANT before substantial completion, all causes of action against CONSULTANT shall accrue and the statute of limitations shall commence to run no later than the date of substantial completion of the Project. For services performed by CONSULTANT after the date of substantial completion but before final completion of the Project, all causes of action against CONSULTANT shall accrue and the statute of limitations shall commence to run no later than the date of final completion. The Parties expressly agree that the discovery rule for purposes of accrual shall not apply.
- 8.15 **Publicity.** Neither of the Parties shall make any press release, news disclosure or other advertising related to the Project that includes the name of the other party without first obtaining the written approval of the other party.
- 8.16 **Federal, State and Local Law.** The CONSULTANT shall comply with all federal, state, county and local laws, ordinances, rules and regulations now and hereafter in force which may be applicable to the operation of its business at the airport as amended from time to time.
- 8.17 **Airport Security Requirements.**
- a. General.** The federal Transportation Security Administration is the federal agency primarily responsible for overseeing the security measures utilized by the airport owner pursuant to the relevant provisions of Chapter 49, United States Code, and regulations adopted under the authority of the Code, including but not limited to 49 CFR 1540, et seq. Violations of the statutes or regulations may result in severe civil monetary penalties being assessed against the airport operator. It is the intent of the airport operator that the burdens and consequences of any security

violations imposed upon the airport operator as a result of actions by an airport tenant or the airport tenant's employees, agents, invitees, or licensees shall be borne by the airport tenant.

**b. Airport Tenant Defined.** An airport tenant means any person, entity, organization, partnership, corporation, or other legal association that has an agreement with the airport operator to conduct business on airport property. The term also includes an airport tenant as defined in 49 CFR 1540.5. Each signatory to this Agreement, other than the airport operator, is an airport tenant.

**c. Airport Operator Defined.** As used in this Agreement, airport operator means Monroe County, Florida, its elected and appointed officers, and its employees.

**d. Airport Property Defined.** Airport property shall mean the property owned or leased by, or being lawfully used by, the airport operator for civil aviation and airport-related purposes. For purposes of this Agreement, airport property is the property generally referred to as the Key West Airport, the Marathon Airport, or both as may be set forth in this Agreement.

**e. Inspection Authority.** The airport tenant agrees to allow Transportation Security Administration (TSA) authorized personnel, at any time or any place, to make inspections or tests, including copying records, to determine compliance of the airport operator or airport tenant with the applicable security requirements of Chapter 49, United States Code, and 49 CFR 1540, et seq.

**f. Airport Security Program.** The airport tenant agrees to become familiar, to the extent permitted by the airport operator, with the Airport Security Program promulgated by the airport operator and approved by TSA, and also agrees to conform its' operations and business activities to the requirements of the Airport Security Program.

**g. Tenant Security Program.** If permitted under TSA regulations, the airport tenant may voluntarily undertake to maintain an Airport Tenant Security Program as referred to in 49 CFR 1542.113. If the airport tenant voluntarily promulgates an Airport Tenant Security Program that is approved by TSA, such program, as may be amended and approved from time to time, shall be automatically incorporated into this Agreement.

**h. Breach of Agreement.** Should TSA determine that the airport tenant or one or more of the airport tenant's employees, agents, invitees, or licensees has committed an act or omitted to act as required, and such act or omission is a violation which results in TSA imposing a civil penalty against the airport operator in accordance with TSA's Enforcement Sanction Guidance Policy, such determination and imposition of a civil penalty by TSA shall be considered a significant breach of this Agreement.

**(1). Minimum Violation.** If the violation is the first or second violation attributed to the airport tenant and is a civil penalty minimum violation as provided for in TSA's Enforcement Sanction Guidance Policy, the airport tenant may cure the breach by paying to the airport operator the total costs incurred by the airport operator, including any fines or penalties imposed, in investigating, defending, mitigating, compromising, or taking of remedial measures as may be agreed to by TSA, to include but not be limited to reasonable attorney's fees and costs incurred

in the investigation, defense, compromising, mitigation, or taking of remedial action measures. If the violation is a third violation, or there are multiple violations in excess of two violations, that is or are a civil penalty minimum violation□, the airport tenant shall pay to the airport operator the total costs incurred by the airport operator, including any fines or penalties imposed, in investigating, defending, compromising, mitigating, or taking of remedial measures as may be agreed to by TSA, to include but not be limited to reasonable attorney's fees and costs incurred in the investigation, defense, compromising, mitigation, or taking of remedial action measures; and, further, the airport operator shall have the right to unilaterally cancel this Agreement, such cancellation to be effective thirty calendar days after receipt by the airport tenant of written notice of cancellation of this Agreement by the airport operator.

**(2). Moderate Violation.** If the violation is the first or second violation attributed to the airport tenant and is a civil penalty moderate violation as provided for in TSA's Enforcement Sanction Guidance Policy, the airport tenant may cure breach by paying to the airport operator the total costs incurred by the airport operator, including any fines or penalties imposed, in investigating, defending, compromising, mitigating or taking of remedial measures as may be agreed to by TSA to include but not be limited to reasonable attorney's fees and costs incurred in the investigation, defense, compromising, mitigation, or taking of remedial action measures; and, further, the airport tenant may cause all of airport tenant's employees involved in the airport tenant's business operations on the airport property to undergo such security training as may be required by the airport operator. The total cost of the training shall be paid for by the airport tenant. If the violation is a third violation, or there are multiple violations in excess of two violations, that is or are a civil penalty moderate violation, the airport tenant shall pay to the airport operator the total costs incurred by the airport operator, including any fines or penalties imposed, in investigating, defending, compromising, mitigating, or taking of remedial measures as may be agreed to by TSA, to include but not be limited to reasonable attorney's fees and costs incurred in the investigation, defense, compromising, mitigation, or taking of remedial action measures; further, the airport operator shall have the right to unilaterally cancel this Agreement such cancellation to be effective thirty calendar days after receipt by the airport tenant of written notice of cancellation of this Agreement by the airport operator.

**(3). Maximum Violation.** If the violation is the first violation attributed to the airport tenant and is a civil penalty "maximum violation" as provided for in TSA's Enforcement Sanction Guidance Policy, the airport tenant may cure the breach by paying to the airport operator the total costs incurred by the airport operator, including any fines and penalties imposed, in investigating, defending, compromising, mitigating, or taking of remedial measures as may be agreed to by TSA, to include but not be limited to reasonable attorney's fees and costs incurred in the investigation, defense, compromising, mitigation, or taking of remedial action measures; and, further, the airport tenant may cause all of airport tenant's employees involved in the airport tenant's business operations on the airport property to undergo such security training as may be required by the airport operator. The total cost of the training shall be paid for by the airport tenant. If the violation is a second violation, or there are multiple violations, that is or are a civil penalty "maximum violation", the airport tenant shall pay to the airport operator the total costs incurred by the airport operator, including any fines or penalties imposed, in investigating, defending, compromising, mitigating, or taking of remedial measures as may be agreed to by TSA, to include but not be limited to reasonable attorney's fees and costs incurred in the

investigation, defense, compromising, mitigation, or taking of remedial action measures; and, further, the airport operator shall have the right to unilaterally cancel this Agreement, such cancellation to be effective thirty calendar days after receipt by the airport tenant of written notice of cancellation of this Agreement by the airport operator.

**(4). Mitigation of Breach.** TSA has a policy of forgoing civil penalty actions when the airport operator detects violations, promptly discloses the violations to TSA, and takes prompt corrective action to ensure that the same or similar violations do not recur. This policy is known as the TSA Voluntary Disclosure Program Policy, and is designed to encourage compliance with TSA regulations, foster secure practices, and encourage the development of internal evaluation programs. The airport tenant agrees that upon detecting a violation the airport tenant will immediately report it to the airport operator. Should the TSA ultimately determine that the violation was committed by the airport tenant, or an employee, agent, invitee, or licensee of the airport tenant, but the violation should result in the issuance of a letter of correction in lieu of a civil penalty, then the airport tenant shall reimburse the airport operator the total costs incurred by the airport operator in investigating, defending, mitigating, or taking of remedial measures as may be agreed to by TSA, to include but not be limited to reasonable attorney's fees and costs incurred in the investigation, defense, mitigation, or taking of remedial action measures. A violation resulting in the issuance of a letter of correction shall not be considered to be a breach of this Agreement by the airport tenant.

**(5). Survival of Sub-Section.** This sub-section 8.17 shall survive the cancellation or termination of this Agreement, and shall be in full force and effect.

8.18 Mutual Review. This Agreement has been carefully reviewed by CONSULTANT and the COUNTY; therefore this Agreement is not to be construed against either party on the basis of authorship.

8.19 Entirety of Agreement. This Agreement constitutes the entire Agreement between the parties with respect to the subject matter hereof and supersedes all prior negotiations and discussions concerning the subject matter hereof.

**THE REMAINDER OF THIS PAGE HAS BEEN INTENTIONALLY LEFT BLANK.**

**IN WITNESS WHEREOF**, the parties hereto have executed this Agreement on the day and date first written above in four (4) counterparts, each of which shall, without proof or accounting for the other counterparts, be deemed and original contract.

(SEAL)

**BOARD OF COUNTY COMMISSIONERS**

**ATTEST: DANNY L. KOLHAGE, CLERK**

**OF MONROE COUNTY, FLORIDA**

By \_\_\_\_\_

Mayor/Chairman

**CONSULTANT:**

CDM SMITH INC.

By I. LIZAMA

Title ASSOCIATE

Witness

Karla A. Montez

MONROE COUNTY ATTORNEY  
APPROVED AS TO FORM

Pedro J. Mercado  
PEDRO J. MERCADO  
ASSISTANT COUNTY ATTORNEY

Date 1/3/12

**WORKERS' COMPENSATION  
INSURANCE REQUIREMENTS**

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Prior to the commencement of work governed by this Agreement, the Consultant shall obtain Workers' Compensation Insurance with limits sufficient to respond to Florida Statute 440.

In addition, the Contractor shall obtain Employers' Liability Insurance with limits of not less than:

\$1,000,000 Bodily Injury by Accident  
\$1,000,000 Bodily Injury by Disease, policy limits  
\$1,000,000 Bodily Injury by Disease, each employee

Coverage shall be maintained throughout the entire term of the Agreement.

Coverage shall be provided by a company or companies authorized to transact business in the State of Florida and the company or companies must maintain a minimum rating of A-VI, as assigned by the A.M. Best Company.

If the Consultant has been approved by Florida's Department of Labor, as an authorized self-insurer, the County shall recognize and honor the Contractor's status. The Consultant may be required to submit a Letter of Authorization issued by the Department of Labor and a Certificate of Insurance, providing details on the Contractor's Excess Insurance Program.

If the Consultant participates in a self-insurance fund, a Certificate of Insurance will be required. In addition, the Consultant may be required to submit updated financial statements from the fund upon request from the County.

## **GENERAL LIABILITY INSURANCE REQUIREMENTS**

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Prior to the commencement of work governed by this Agreement, the Consultant shall obtain General Liability Insurance. Coverage shall be maintained throughout the life of the contract and include, as a minimum:

- Premises Operations
- Products and Completed Operations
- Blanket Contractual Liability
- Personal Injury Liability
- Expanded Definition of Property Damage

The minimum limits acceptable shall be:

\$1,000,000 Combined Single Limit (CSL)

If split limits are provided, the minimum limits acceptable shall be:

\$ 500,000 per Person

\$1,000,000 per Occurrence

\$ 100,000 Property Damage

An Occurrence Form policy is preferred. If coverage is provided on a Claims Made policy, its provisions should include coverage for claims filed on or after the effective date of this contract. In addition, the period for which claims may be reported should extend for a minimum of twelve (12) months following the acceptance of work by the County.

The Monroe County Board of County Commissioners shall be named as Additional Insured on all policies issued to satisfy the above requirements.

**VEHICLE LIABILITY  
INSURANCE REQUIREMENTS**

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Recognizing that the work governed by this Agreement requires the use of vehicles, the Consultant, prior to the commencement of work, shall obtain Vehicle Liability Insurance. Coverage shall be maintained throughout the life of the contract and include, as a minimum, liability coverage for:

- Owned, Non-Owned, and Hired Vehicles

The minimum limits acceptable shall be:

\$1,000,000 Combined Single Limit (CSL)

If split limits are provided, the minimum limits acceptable shall be:

\$500,000 per Person

\$1,000,000 per Occurrence

\$100,000 Property Damage

The Monroe County Board of County Commissioners shall be named as Additional Insured on all policies issued to satisfy the above requirements.

**ARCHITECTS/ENGINEERS ERRORS AND OMISSIONS LIABILITY**  
(1996 Edition)  
**INSURANCE REQUIREMENTS**

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Recognizing that the work governed by this Agreement involves the furnishing of architectural or engineering services, the Consultant, prior to the commencement of work, shall purchase and maintain, throughout the life of the agreement, Architects/Engineers Errors and Omissions Liability Insurance which will respond to damages resulting from any claim arising out of the negligent acts, errors or omissions of Consultant in the performance of professional services under this agreement. This insurance shall be maintained in force for a period of two years after the date of Substantial Completion of any project governed by this agreement.

The minimum limits of liability shall be:

\$2,000,000 per claim/\$2,000,000 aggregate



**EXHIBIT B**

**SCHEDULE OF HOURLY BILLING RATES**

<b><u>CATEGORIES</u></b>	<b><u>HOURLY RATES*</u></b>
<b><u>PROFESSIONAL SERVICES</u></b>	
OFFICER	\$200.00
PRINCIPAL/ASSOCIATE	\$180.00
SENIOR PROFESSIONAL	\$155.00
PROFESSIONAL II	\$135.00
PROFESSIONAL 1	\$120.00
<b><u>PROFESSIONAL SUPPORT SERVICES</u></b>	
SENIOR SUPPORT SERVICES	\$125.00
STAFF SUPPORT SERVICES	\$100.00
<b><u>FIELD SERVICES</u></b>	
SENIOR PROFESSIONAL	\$130.00
PROFESSIONAL	\$95.00
<b><u>PROJECT SUPPORT SERVICES</u></b>	
PROJECT ADMINISTRATION	\$85.00

**\*LOADED (BURDENED) HOURLY RATES SUBJECT TO CHANGE  
JANUARY 2013**

